INTERIOR BOARD OF INDIAN APPEALS

State of California v. Acting Pacific Regional Director, Bureau of Indian Affairs

40 IBIA 70 (08/10/2004)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

STATE OF CALIFORNIA, Appellant,	:	Order Affirming Decision
v.	:	Docket No. IBIA 01-140-A
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	August 10, 2004

The State of California (State), appeals a May 7, 2001, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to acquire into trust for the Tyme Maidu Tribe of the Berry Creek Rancheria (Tribe), a parcel of land consisting of approximately 18.5 acres owned by the Tribe. Since 1996, a portion of this parcel has been used by the Tribe as a parking lot for the Tribe's casino. This 18.5-acre parcel is contiguous to land already held in trust by the United States where the casino is located. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director's decision.

BIA currently holds two properties in trust for the Tribe, an original 33-acre tract acquired in 1913, located about 27 miles east of the City of Oroville, California, and a 32-acre parcel taken into trust in 1988, located approximately 3 miles east of Oroville. The Tribe presently uses the latter parcel, the 32-acre parcel, for residential purposes as well as for a 70,000 square foot Class III casino. 1/ The Regional Director's decision approved the trust acquisition for a third tract of land for the Tribe, an 18.5-acre parcel, contiguous to the west boundary of the 32-acre parcel, and referred to in the decision as Butte County Assessor Parcels Numbered 068-160-076 and 068-160-077.

In 1994, the Tribe enacted Resolution No. 94-33, to initiate its request to have BIA take the 18.5-acre parcel into trust. The resolution represented, as the Tribe has consistently represented since then, that "no gaming will actually take place" on this 18.5-acre tract, but that

1/ A Class III casino has Class III gaming, which is all gaming that is not Class I gaming or Class II gaming, as defined by the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(8) (2000).

"it will be used for access to the gaming enterprise and for parking by gaming enterprise customers and employees[.]" (Res. No. 94-33, Nov. 30, 1994.)

In 1995, the Tribe purchased the 18.5-acre parcel in fee simple ownership. That same year, BIA sent a letter to the State's Lands Commission and the California Attorney General's Office, enclosing an Environmental Assessment (EA), dated April 17, 1995, prepared for the trust acquisition proposal, to comply with the National Environmental Policy Act (NEPA). The 1995 EA noted that the 18.5-acre parcel would be used "to accommodate parking and access for the gaming facility."

In 1996, the Tribe constructed the Gold Country Casino on the 32-acre trust parcel as well as a 3.6-acre parking lot for the casino, which used 3.0 acres of the 18.5-acre parcel.

In 1997, another EA and related May 27, 1997, Finding of No Significant Impact (FONSI), were provided to the State for comment through its State Clearinghouse. 2/ The 1997 FONSI states, in pertinent part: "The use of the [18.5-acre parcel] would be for the development of a new access road from State Highway 162 to the Tribe's gaming facility/parking area and tribal office."

On September 10, 1999, the Tribe and State entered into a gaming compact for Class III gaming on the 32-acre parcel. A gaming compact is a contract negotiated between a tribe and a state, under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA), to permit and govern the conduct of Class III gaming on Indian lands. 25 U.S.C. § 2710(d)(3). The "Tribal-State Compact between the State of California and the Tyme Maidu Tribe Berry-Creek Rancheria," (Compact) 3/ defines "Gaming Facility" or "Facility" as

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2/ The first EA was prepared for BIA and the National Indian Gaming Commission (NIGC). When the Tribe decided not to operate its gaming facility under a management contract, NIGC withdrew from the NEPA process, and the second EA was only prepared for BIA.

3/ The Board has considered the Compact and other documents submitted by the State with a motion to supplement the administrative record. Documents not considered by BIA in rendering a decision are not part of BIA's administrative record. Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, 27 IBIA 48, 53-54, n.10. Nevertheless, those documents have been reviewed to the extent appropriate to fully consider the State's arguments in this appeal, and are part of the Board's administrative record. See Olson v. Portland Area Director, 31 IBIA 44 (1977) (Board has allowed parties to supplement record on appeal as long as opposing parties have an opportunity to respond). The State objects to the Board giving the Declaration of Goody Mix regarding Resolution SPO-01-012

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"any building in which Class III gaming activities or gaming operations occur, * * * and all rooms, buildings, and areas, including parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation, * * *." (Compact, § 2.8.) The Compact also provides that no more than two Gaming Facilities may be established and operated and only on those lands on which gaming may lawfully be conducted under IGRA. Id. § 4.2.

The Compact also provides detailed and specific mechanisms for enforcement in the event of disputes, disagreements or breaches by either party, ranging from informal dispute resolution mechanisms to more formal legal actions. The Compact imposes an obligation on the parties to "make their best efforts to resolve disputes that occur under this Gaming Compact by good faith negotiations whenever possible." Id. § 9.1. A schedule is set forth in the Compact in order to require that the parties meet and confer in good faith. Id. § 9.1 (a), (b). In addition, either party may seek to have the dispute resolved by an arbitrator. Id. §§ 9.1(c), 9.2. If a disagreement is not resolved by these mechanisms, then, as a last resort, "[e]ither party may bring an action in federal court, after providing a sixty (60) day written notice of an opportunity to cure any alleged breach of this Compact, for a declaration that the other party has materially breached this Compact." Id. § 11.2.1. Addressing the possibility that a federal court might determine that it lacks jurisdiction, the parties may bring an action "in the superior court for the county in which the Tribe's Gaming Facility is located." Id. Furthermore, the Compact states that the "parties expressly waive their immunity to suit." Id. § 9.4.

In order for the Compact to go into effect, the Secretary of the Interior had to publish a notice of approval in the Federal Register. 25 U.S.C. § 2710(d)(3)(B); see 25 U.S.C. § 2710(d)(8)(C), (d)(8)(D). In May 2000, the Secretary of the Interior approved the Compact at issue in this appeal. At the time the Compact was entered into by the State and Tribe, the Tribe was already operating not only a Class III gaming casino, but was also operating a parking lot for casino patrons on the 18.5-acre tract owned by the Tribe.

On August 1, 2000, the Tribe passed Resolution No. 00-25, which renewed the Tribe's request that the United States place the 18.5-acre parcel into trust for the Tribe. BIA then sent notices to the State, including the Office of the Attorney General, informing it of the Tribe's renewed application to have the 18.5-acre parcel taken into trust, and inviting comments. The Notice states that "[t]he Tribe specifically called for the acquisition of additional land to the

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of the National Congress of American Indians (NCAI) any consideration in that the declaration is not competent evidence, forms no part of the BIA decision or administrative record, and is untimely. (State's Resp. to Tribe's Supp. Br. at 1, n.1.) The Board has given no weight to the NCAI submission.

west of the New Rancheria to provide room for additional business ventures. The Tribe is proposing to develop a portion of this parcel as a parking lot, with ingress and egress to Highway 162." (Notice of Land Acquisition Application, August 30, 2000, at 2.) In response to the invitation to provide comments, the State's Attorney General sent a letter to BIA on September 29, 2000, stating that

> [w]hile there is no indication that the contemplated uses would or would not include gaming facilities, this application did originally include a statement that the land acquisition was intended, at least in part, for gaming activities. If gaming remains an intended purpose for either of these parcels, this acquisition must be governed by the land acquisition provisions of the Indian Gaming Regulatory Act (25 U.S.C. § 2719, subd. (b)).

(Letter from LeForestier to Risling of September 29, 2000, at 1.) In its comments, the State did not mention its Compact with the Tribe.

As relevant to the facts of this case, section 20 of IGRA, 25 U.S.C. § 2719, prohibits Class III gaming on Indian lands acquired in trust after October 17, 1988 (the date of IGRA's enactment), unless the lands are located within or contiguous to the reservation of the tribe on October 17, 1988. 25 U.S.C. § 2719(a). Otherwise, 25 U.S.C. § 2719(b) — referred to by the State in its comments — requires that the Governor of the State in which the gaming activity will be conducted concur in the Secretary's determination to permit gaming on the newly-acquired trust lands. IGRA's prohibition only applies to "gaming" regulated by IGRA, meaning Class III gaming.

In December, 2000, in a letter addressed to the State's Deputy Attorney General, the Tribe responded to the State's comments by stating that parking lots are not considered gaming and are not subject to IGRA. Specifically, the Tribe stated:

> Any reference to the intended use of the subject parcels as gaming is incorrect and not valid. The stated intended purpose[s], which include a parking lot, are not considered gaming and not subject to the provisions of the Indian Gaming Regulatory Act (IGRA). Parking lots are not considered gaming acquisitions under IGRA

(see checklist for gaming acquisitions and IGRA Section 20 determinations, dated February 18, 1997).

(Letter from Edwards to Le Forestier of December 1, 2000, at 1.) This position was reiterated in a letter dated December 1, 2000, to BIA from the Tribe, where the Tribe summarized its responses and again stated that "the acquisition of these parcels is not for gaming." (Letter from Edwards to Risling of December 1, 2000, at 1.) The State did not respond to the Tribe.

On May 7, 2001, the Regional Director approved the Tribe's trust application for the 18.5-acre parcel, under the trust acquisition authority provided in 25 U.S.C. §§ 465 and 2202. The decision notes that "[t]he subject parcel is utilized as an overflow parking lot for the Gold Country Casino." (Letter from Murillo to Edwards of May 7, 2001, at 3.) It reiterates that "[t]he acquisition will enable the Tyme Maidu Tribe of the Berry Creek Rancheria to use an area for overflow parking for its gaming facility." Id. at 5. It also states that the additional land "will enhance their existing enterprises and further enhance tribal self-determination." Id. In reaching her decision, the Regional Director did not discuss the Tribal-State Compact, but did quote from the Tribe's December 1, 2000, letter, which noted that under a 1997 BIA checklist for gaming acquisitions, the parking lot would not be considered a gaming acquisition. 4/ The Regional Director's decision notes that the 18.5 acres will be used by the Tribe for additional parking and improved safer access to the existing tribal enterprises. This appeal followed.

Since 1994, BIA has periodically issued, and revised, a "checklist" for processing requests to acquire land into trust for or related to gaming. Effective February 18, 1997, BIA's guidance provided that a land acquisition for a parking lot to enhance an existing gaming facility was not considered a land acquisition "for gaming," because no gaming would be conducted in the parking lot." Under the 1997 guidance and delegations, the Area Directors (now Regional Directors) of BIA had the authority to approve such land acquisitions. 5/

4/ While not referred to or discussed in the Regional Director's decision, except in the quotation from the Tribe's letter, the 1997 checklist was included in the administrative record. For purposes of this appeal, the Board assumes it was relied upon by the Regional Director in reaching her decision.

5/ Prior to 1997, however, such a parking lot would have been treated as "for gaming purposes" and processed in accordance with IGRA Section 20. See 1994 Checklist, which stated, in pertinent part, that "if the proposed acquisition is for a project which proposes to enhance or expand an existing gaming facility, then the acquisition is for gaming purposes. A parking lot intended to enhance an existing gaming facility was given as a specific example of an acquisition for "gaming purposes." A letter from Carmen G. Facio, Acting Area Director to

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Discussion

On appeal, the State argues that BIA improperly failed to treat this acquisition as an IGRA "gaming" acquisition. The State contends that the Tribe's intent to use the 18.5-acre parcel as a casino parking lot renders the parking lot a "gaming facility" under the Compact. The State argues that BIA is bound by the terms of the Compact, because it was approved by the Secretary of the Interior, and because it is federal law. The State further argues that the 1997 checklist relied upon by BIA does not supercede the terms of the Compact and that IGRA's requirements are triggered by the language of the Compact. In its reply brief, the State also appears to argue that IGRA itself — apart from the Compact — directly applies to casino parking lots as a "gaming" activity that is subject to IGRA Section 20's prohibition. According to the State, IGRA Section 20 prohibits gaming on the 18.5-acre parcel without gubernatorial concurrence, because the contiguous tract is not a reservation. The State adds that a tribe cannot create its own reservation simply by placing housing on trust land. The State concludes that the proposed trust acquisition permits an illegal gaming purpose and should be reversed by the Board.

BIA and the Tribe respond that the Acting Regional Director's decision to approve the trust acquisition was fully consistent with the Indian Reorganization Act, and that IGRA does not apply. They contend that the parking lot is not used for gaming and is, thus, not regulated by IGRA. In the alternative, BIA argues that even if IGRA applied, the parcel is contiguous to a reservation existing on October 17, 1988, and thus gaming is permitted on the parcel without gubernatorial concurrence.

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Michale G. Baksh, Ph.D., Principal Environmental Planner, of May 1, 1997, noted that effective Feb. 18, 1997, a land acquisition which is used as an enhancement to a gaming facility, such as a parking lot, was no longer considered a gaming land acquisition. The May 1 letter enclosed a copy of the 1997 "Checklist for Gaming Acquisitions and I.G.R.A. Section 20 Determinations." A new checklist was issued in 2001, which similarly distinguishes parking lots from gaming facilities. "[I]f a tribe intends to expand existing parking facilities for an existing gaming establishment, the acquisition should not be deemed to be for gaming because there is no gaming conducted in the parking lot." (Checklist for Gaming Acquisitions, Oct. 2001, at 5.) The 2001 Checklist, however, requires central office approval by the Assistant Secretary - Indian Affairs for all acquisitions for "gaming related purposes," including parking facilities, even though no gaming will be conducted on the property. The 2001 checklist was issued after the Regional Director issued her decision in the present case.

The Tribe separately notes that the State did not raise the Compact to BIA or prior to this appeal, and therefore the State's "Compact argument" should not be considered by the Board. In any event, the Tribe contends that the Compact was between the State and the Tribe and that the definition of a "gaming facility" in the Compact does not govern what constitutes a "gaming acquisition" for purposes of taking land into trust. Even if the Compact were relevant, the Tribe argues, the Supremacy Clause of the U.S. Constitution, Article VI, clause 2, precludes a "tribal-state compact" from overriding BIA regulations and guidelines. The Tribe concludes its argument by contending that neither IGRA nor the Compact restrict the acquisition of land in trust.

BIA decisions whether to take land into trust are discretionary. The Board does not substitute its judgment for BIA's judgment in reviewing decisions based on BIA's exercise of its discretion. Rather, the Board reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 196 (1989); see Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-39 (1999); City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 103-04 (1999); see also McAlpine v. United States, 112 F.3d 1429, 1436 (10th Cir. 1997). With regard to BIA's discretionary decisions, the appellant bears the burden of proving that the BIA did not properly exercise its discretion. City of Lincoln City, 33 IBIA at 104.

The Board has full authority to review any legal challenges that are raised in a trust acquisition case. With regard to BIA's legal determinations, the appellant bears the burden of proving that BIA's decision was in error or that BIA's application of the legal determination was not supported by substantial evidence. City of Lincoln City, 33 IBIA at 104.

The State contends that its appeal can be characterized either as "a challenge to BIA's legal conclusion that it was not bound by the terms of the Compact or as a challenge to the exercise of the Acting Regional Director's discretion in determining that the acquisition was not subject to IGRA Section 20." (Appellant's Opening Br. at 8.) The Board concludes that BIA's decision — whether viewed as a legal determination that this acquisition is a non-gaming acquisition, or as an exercise of discretion in declining to treat it as a gaming acquisition — should be affirmed.

Properly framed, the central issues in this appeal are whether BIA was required to consider the terms of the Tribal-State Compact even though the State did not raise it, and if so, whether it has the effect of legally requiring BIA to consider an acquisition of land used for a "gaming facility" as defined in the Compact, as a "gaming" acquisition, subject to the same review procedures, regulations, and statutes applicable to "gaming" acquisitions under IGRA. Also, in light of the arguments raised in the parties' answer and reply briefs, the Board will

address whether — apart from the Compact — IGRA directly treats a casino parking lot as a "gaming" activity subject to IGRA section 20, so that BIA must treat this acquisition as a "gaming" acquisition.

Addressing the latter issue first, the Board dispenses with the suggestion that this trust acquisition violates IGRA itself, or that even in the absence of the Compact, IGRA by its own terms would require BIA to treat this as a "gaming" acquisition. Although IGRA does not define "gaming," except to distinguish among three distinct classes of gaming, it is clear from both the statute and the legislative history that "gaming" involves some type of game of chance for a prize or award of value. See 25 U.S.C. § 2703(6), (7) (defining Class I and Class II gaming). None of the examples of Class III gaming given in the legislative history – e.g., banking cards, slot machines, horse and dog racing — are of a like kind to parking vehicles. See, e.g., Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 7, (1998), reprinted in 1988 U.S.C.C.A.N. 3071, 3077.

Nowhere does the language of IGRA indicate that Section 20's prohibition was intended to apply to parking lots which, while not "gaming," are related to gaming. Merely because a parking lot is used to enhance a casino does not mean it constitutes "gaming" under IGRA. 6/ Moreover, as the Board has already held, "IGRA does not, by its terms, restrict trust acquisition of land. Rather it simply prohibits gaming on certain lands acquired in trust after October 17, 1988." Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, 27 IBIA 48, 55 (1994).

The State relies, in part, on a National Indian Gaming Commission (NIGC) proposed rule for regulating environmental, health, and safety matters related to Indian gaming, which includes parking areas within its scope. Apart from the fact that the State cites only a proposed rule, not a final one, the proposed rule itself makes a distinction between "area(s) where gaming activities are conducted," and "parking areas used primarily for gaming patrons." See 66 Fed. Reg. 50127 (October 2, 2001). Furthermore, the scope of the rule, as proposed, would include "any other area(s) over which the tribal government's gaming regulatory body has

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6/ Because we conclude that the intended use — parking — does not constitute "gaming" under IGRA, we need not reach the issue whether gaming would be permitted on this land under IGRA. Although it should not need repeating, in light of the arguments made in the briefs, the Board reiterates that BIA's action to accept this property into trust was not a determination that gaming would be permitted on the property. Although BIA argues in its brief in this appeal— as an alternative argument — that gaming would be permissible on this property without gubernatorial concurrence, the Regional Director's decision to acquire this property in trust made no such determination, and was premised on the Tribe's representation that no gaming will be conducted on it.

jurisdiction under the tribal government's approved gaming ordinance," which also appears intended to include areas where gaming activities subject to IGRA section 20 are not necessarily conducted, but which NIGC proposed to regulate or oversee in some fashion. Whatever the scope of oversight that NIGC has or may choose to assert over gaming-related activities, which do not themselves constitute gaming, the Board is not convinced that such NIGC involvement transforms the present BIA trust acquisition of this property into one "for gaming," when no actual gaming will occur on it.

The State contends that the 1994 and 1997 checklists are "contradictory," and also notes that neither was promulgated as a regulation under the Administrative Procedure Act. While the 1994 checklist's category of land "for gaming purposes" was broader than the 1997 checklist's category of land "for gaming," the Board is not convinced that the 1997 checklist was an impermissible change in BIA's internal review procedures for land acquisition. Both checklists are consistent with IGRA; the 1994 checklist simply appears to reflect a policy choice more rigorous than what the law itself required. And the fact that neither checklist was promulgated under the APA is irrelevant in this case, because our decision does not rest on whether the checklists have the force of regulations.

The Board concludes that casino-related parking on the 18.5-acre parcel does not constitute "gaming" under IGRA. Therefore, unless the Compact itself altered BIA's obligations for this trust acquisition, BIA was not required to treat this as a "gaming" acquisition because no gaming is to be conducted on the property. For the same reasons, we also conclude, to the extent the State contends otherwise, that BIA's 1997 Checklist was consistent with IGRA in allowing BIA to treat this as a non-gaming acquisition.

We now turn to the State's contention that BIA was required to treat the trust acquisition as a "gaming" acquisition because the Tribal-State Compact entered into on September 10, 1999, defines a casino parking lot as a "gaming facility."

The State argues that "the definition of the term 'gaming facility' is ultimately determinative of this appeal" (Appellant's Opening Br. at 11) because "the Tribe has promised to restrict the development of its Gaming Facility (defined to include a casino parking lot) to land upon which gaming may be lawfully conducted under IGRA." Id. at 2.

The Board disagrees that the definition of "gaming facility" in the Compact is determinative of this appeal. What is determinative is the issue of whether BIA was legally required to consider the Compact's definition of "gaming facility" for this trust acquisition, when the State never brought the Compact or the definition to BIA's attention, did not object to the acquisition on the grounds that the existing and clearly-intended use of the parcel was in violation of the Compact, and did not articulate why the alleged violation should preclude BIA's acceptance of the parcel into trust. The Board concludes that under these circumstances,

BIA was not required to consider the Compact's provisions regarding gaming facilities or the alleged Tribal violation of the Compact. Therefore, in resolving this appeal, the Board does not even need to reach the issue whether the parking lot violates the Compact, since the relevant provisions were never brought to the attention of BIA by the State.

As a general rule, the Board requires complainants to first present issues and arguments to BIA for consideration, before they may raise them on appeal. The Board has consistently held that it is not required to consider arguments on appeal that were not raised to the decisionmaker below. Estate of Ervin Lyle Waits, 36 IBIA 46, 47 (2001); Shoshone-Bannock Tribal Credit Program v. Portland Area Director, 35 IBIA 110, 115-16 (2000). Particularly in light of our conclusion, reached below, that the Compact is not "federal law," we see no reason to depart from the general rule. The State had the burden of bringing to the attention of BIA any alleged inconsistency between the Tribe's intended or actual use of the parcel and the Tribe's obligations or "promises" under the Compact, and to articulate how or why the alleged inconsistency should affect BIA's trust acquisition decision.

The State argues that BIA's August 30, 2000, Notice of Land Acquisition Application was misleading because "it implies, falsely," (Appellant's Opening Br. at 5), that the casino parking lot was to be built in the future, when in fact it had been built in 1996, and that the Tribe intends to use the property, at least in part, for non-gaming related activities. Although BIA's notice might have been more explicit, the Board disagrees that it was misleading, or that the State was prejudiced in any way. Through at least two EA's issued prior to 2000, the State had been provided with *actual notice* that the property was already being used as a casino parking lot, and BIA's notice in 2000 did not suggest otherwise. In addition, the Tribe's use was open and notorious. Finally, the Tribe's response to the State's comments emphasized that parking lots are not "gaming" under IGRA, an emphasis that would have served little purpose if the Tribe had not intended the parking lot to be gaming-related. As such, the Board is not convinced that the State can be excused from its burden to bring the Compact terms to BIA's attention, based on insufficient notice of the actual intended use of the property. And it was not sufficient for the State to refer only to IGRA in its comments, to put BIA on notice that the State believed the existing and intended use was inconsistent with specific provisions in the Compact. The State's comments were limited to IGRA, and provided no indication that the "determinative issue" – as the State now contends in this appeal – is the definition of "gaming facility" in the Compact.

We assume, for the purposes of this appeal, that BIA may be charged with general notice of the Tribal-State Compact, first, because the Secretary approved it and, second, because the Tribe brought the Compact to BIA's attention in a letter dated December 1, 2000, referring to an unrelated provision concerning revenue sharing. Yet, it is not enough for BIA simply to be on notice of the existence of a compact in order to be expected to consider every conceivable right or obligation between the parties. The Department of the Interior is not a

party to the Compact, and the Secretary's review and approval role is narrowly constrained by IGRA. See 25 U.S.C. § 2710(8)(B). As Congress noted, "[t]he Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns." See, e.g., Indian Gaming Regulatory Act, S. Rep. No. 100-446, at 7, (1998), reprinted in 1988 U.S.C.C.A.N. 3071, 3083. The "two equal sovereigns" here are the Tribe and the State. Certainly as a matter of contract law, and given the Secretary's limited role, the Department cannot be "bound" by terms that the State and Tribe agreed to in their Compact.

The State also contends, however, that the Compact itself "is federal law," apparently because it is authorized by IGRA and approved by the Secretary. The only case cited by the State in support of its proposition does not reach this conclusion. In Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1977), the Ninth Circuit held the State to the terms of the compact to which it agreed. While the court noted that compacts are "quite clearly * * * a creation of federal law," and certainly IGRA prescribes their scope, nowhere does the court reach the conclusion that compacts are to be considered or equated to federal law. Id. at 1056. Indeed, there appear to be no cases that elevate a compact to federal law.

The State contends that because IGRA "was intended to allow tribes and states to come to their own unique jurisdictional arrangements, and was intended to give such arrangements effect," (Appellant's Opening Br. at 7), BIA was required to treat the trust acquisition according to terms dictated by the Compact. As a matter of law, however, BIA is not bound by those jurisdictional arrangements; and, as a matter of discretion, BIA cannot be held to have abused its discretion when the complaining party to the Compact did not bring the "unique jurisdictional arrangements" to BIA's attention. As the State itself points out, the Tribe and the State addressed a number of gaming-related issues "beyond gaming *qua* gaming" in the Compact, which only reinforces the Board's conclusion that BIA should not be required to automatically review and consider gaming compacts whenever it acquires property in trust on which gaming *qua* gaming will not occur.

The Board need not decide how BIA, in considering this application for acquiring land into trust, might have been required to consider the terms of the Compact that the State raises in this appeal, or the relative effect to be given BIA's internal trust acquisition guidelines and the contractual rights of the parties to the Gaming Compact, if the Compact provisions had been brought to the BIA's attention during the comment period. 7/ Similarly, the Board need

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7/ There is nothing in the administrative record or in the submissions of the parties that suggests that the State invoked either the informal or formal dispute resolution provisions of the Compact, described earlier, despite its apparent position here that the Tribe had breached the Compact by using the property as a parking lot for the Class III Gaming Casino from the very day the Compact was signed. As the Tribe itself notes in this appeal, "[i]f the State

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not reach the issue of the interplay between the terms of a gaming compact and the Part 151 process for determining whether the United States should take land in trust. The State did not argue in its briefs that any specific factor listed in 25 C.F.R. § 151.10 was not considered or applied or misapplied. The State did contend, in its Statement of Reasons for its appeal, that BIA failed to address possible jurisdictional conflicts with State and local statutes under 25 C.F.R. § 151.10(f). However, the State did not pursue this contention in its briefs, or explain which specific "jurisdictional conflicts" were brought to BIA's attention, which BIA then allegedly failed to address. BIA did discuss jurisdictional issues, albeit briefly. The Board concludes that the State failed to sustain its burden of proof that BIA did not to consider jurisdictional problems and potential land use conflicts in reaching its decision.

Conclusion

In summary, the Board concludes that parking by casino patrons does not constitute "gaming" under IGRA. The Board also concludes that BIA did not commit legal error or abuse its discretion in failing to consider the terms of the Compact concerning "gaming facilities," because the State failed to bring those terms — and the alleged contract violations associated with the Tribe's use of the property — to BIA's attention. No law or regulation requires BIA, on its own, to review and consider a tribe's gaming compact with the state when the tribe requests that BIA take into trust property on which no gaming will be conducted. Thus, the Board affirms the Regional Director's May 7, 2001, decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decision to acquire the 18.5-acre parcel for the Tyme Maidu Tribe of the Berry Creek Rancheria.

// original signed
Colette J. Winston
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

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contends that the Tribe is breaching, or threatening to breach, the Compact, the State is not without a remedy [under the provisions of the Compact]." (Answer Br. of Real Party in Interest, Tyme Maidu Tribe, at 19.) That is the case, whether or not the land is held in trust.